It is in the discretion of the Magistrate whether he will allow a plea of guilty to be withdrawn. That discretion must be used judicially and it is undesirable to attempt to lay down any hard and fast rule as to how the discretion should be exercised.

Mr. Brodie for the Public Prosecutor referred us to the Criminal Procedure Code, section 173 (a) (b) (m). The latter paragraph enacts that "If the Court finds the accused guilty or if a plea of guilty has been recorded and accepted, the Court shall pass sentence according to law".

This clause speaks of two distinct things, recording a plea and accepting a plea and we are of opinion that until the Court has become *functus officio* it can in a proper case reject a plea which it may have accepted.

It may happen that notwithstanding meticulous compliance with paragraphs (a) and (b) of section 173 the Court becomes aware of some defence and considers that a plea of not guilty could be entered. *R. v. Baker* 7 Cr. App. R., 217, *R. v. Ingleson* 11 Cr. App. R. 21, *R. v. Golathan* 11 Cr. App. R., 79.

In *R. v. Rhodes* 11 Cr. App. R., 33 Lawrence J. said "the court must be satisfied that there really has been a mistake" on the part of the accused in pleading guilty. We see no reason why the Court of trial as well as the Court of Appeal should not correct a mistake before the Court becomes *functus officio—Goh Ah San v. The King* 7 M.L.J., 95 at 99, *R. v. Plummer* (1902) 2 K.B., 339.

It may be, too, that a plea in mitigation raises complicated questions of fact on which it is necessary to take evidence. In such a case the Court may find it more convenient to try the case as a whole and we see no reason why a plea of not guilty should not be substituted for the plea of guilty. This is the procedure in Courts Martial and it is only fair to an accused person that he should have an opportunity of having the truth of allegations in his favour properly investigated, and it is only fair to the Crown that it should have an opportunity of meeting those allegations, and it is right that the Court should ascertain the truth or otherwise of the allegations in the manner most convenient to it.

In the present case we see no evidence of mistake. The accused when charged with causing grievous hurt to his wife pleaded guilty. He also said "I hit my wife with a stick". Later when counsel was engaged by his relatives he wished to withdraw what he had said and to allege that his wife got her injuries by falling down.

There is nothing on the appellant's affidavit to indicate that there was any matter for further enquiry either by the Magistrate or by an appellate Court.

The police informed the Magistrate that the accused had received some slight provocation. There is nothing in the record or in the appellant's affidavit to indicate that the appellant desired to or could set up grave and sudden provocation so as to bring the case under section 335 of the Penal Code.

Having admitted that he caused the hurt he desired three days later to deny having caused the hurt.

Under these circumstances the Magistrate was right in refusing to allow the plea of guilty to be withdrawn.

The appeal is dismissed.

Appeal dismissed.

[APPELLATE CIVIL JURISDICTION]

POYSER, C.J. (F.M.S.), McELWAINE, C.J. (S.S.) AND GORDON-SMITH, Ag. J.A.

August 29, 1939.

SANTA SINGH s/o LEHNA SINGH

v.

SANTA SINGAH s/o MEYA SINGH.

[PERAK CIVIL APPEAL No. 2 of 1939]

Bills of Sale Enactment (Cap. 57)— Section 5— Bill of sale of buffaloes by way of security—offspring of such buffaloes are not included in the property transferred to the grantee.

The offspring of buffaloes or other cattle assigned in a bill of sale which are born after its execution forms no part of the security comprised in favour of the assignee.

Appeal from judgment of Murray-Aynsley J. (on appeal from a Magistrate's Court) reported in (1939) 8 Malayan Law Journal at page 27.

J. A. Thivy for Appellant.

Farr for Respondent.

Poyser, C.J. (F.M.S.)—The respondent brought an action in the Magistrate's Court for:—

1. A declaration that the plaintiff is the holder of the bill of sale over attached two young she-buffaloes and two young he-buffaloes and that the said cattle are not liable to attachment at the instance of Defendant No. 1.
2. Damages for wrongful attachment.
3. Costs of suit.

The Magistrate dismissed the claim with costs, and the respondent appealed. Murray-Aynsley, J. allowed the appeal holding "that a bill of sale when registered is good against execution creditors", that the buffaloes the subject of the bill of sale were adequately described, and that the offspring of such buffaloes were included in the bill of sale.

The appellant appeals against that part of the judgment of Murray-Aynsley, J. which holds "that the offspring of the buffaloes assigned in the bill of sale born after execution of the said bill of sale forms part of the security comprised in favour of the assignee thereof". He also appeals against the order as to costs.

The question to be decided is an interesting one and there does not appear to be any authority directly in point. In the Bills of Sale Acts by Herbert Reed, 14th edition, at page 99, the author states in his notes on section 5 of the English 1882 Act (which is identical with section 5 (ii) of the local Enactment):—

> "It has not yet been decided whether this section affects accessions to the things assigned, as, for example, the young of cattle or sheep, specifically described, born after the bill of sale".

Again, at page 112, in relation to section 6 of the 1882 Act (which is identical with section 5 (iii) of the local Enactment), the author also makes a similar statement, viz:—

> "Whether accessions to the things assigned, as for instance, the young of sheep specifically described are included in the security, is open to question, but in the case of pledges they seem to be included".

A bill of sale, however, is not a pledge.

> "A bill of sale is a document given with respect to the transfer of chattels, and is used in cases where possession is not intended to be given. Such a transaction is not a pledge, the conditions of which are entirely different".
>
> **(Johnson v. Diprose, 1893, 1 Q.B. page 515).**

The authorities which have a bearing on this point are as follows: *In re Sarl. Ex parte Williams,* 1892, 2 Q.B. page 591, in which it was held in regard to the words 'true owner' which occur in both the English and local Acts (section 5 (ii)) that

> "those words are satisfied by the grantor being the true legal owner of the chattels at the time of the execution of the bill of sale".

In this case it is difficult to see how the grantor of the bill of sale can be said to be the true owner of things which are not in existence at the time the bill of sale was executed. In *Thomas v. Kelly and Baker,* 13 A.C. page 506, the following passage occurs in the judgment of Halsbury L.C.:—

> "It is obvious that a bill of sale which purports to assign after-acquired property, whether in the form of a covenant (its true legal effect), or, as stated specifically in words, as part of the security, is not in accordance with the 'form' and therefore void. I doubt whether the reason why it is void is adequately given when it is said that such property is incapable of specific description. I think it also introduces a covenant not in accordance with the form; and the form is here, in my judgment, intended to be exhaustive of what may or may not be included in such a deed".

From these authorities it would appear that the offspring of these buffaloes, which are after-acquired property, were not and could not be included in the bill of sale.

The case which Mr. Farr, for the respondent, principally relied on was *Johnson v. Diprose (supra).* He argued that such case decided that a bill of sale constitutes a transfer of chattels subject to restrictions as to the right to take possession of such chattels. He further argued that as the buffaloes were in law transferred to the grantee under the bill of sale, the offspring a natural increase would also be transferred.

I am unable to accept this latter argument. The facts in *Johnson v. Diprose* were very different, the question being whether certain furniture was rightly or wrongly seized by the grantee—(in the Federated Malay States, property the subject of a bill of sale can only be seized by order of a competent Court). There is nothing in this case to modify in any way the principles so frequently laid down that the only chattels subject to a bill of sale are those that are set out and clearly described in the schedule.

I would, therefore, allow the appeal and set aside so much of the judgment of Murray Aynsley J. which declares that the offspring of the buffaloes mentioned in the bill of sale are not liable to attachment. The appellant is entitled to the costs of this appeal only. I would make no order as to the other costs. The respondent has been partially successful in his appeal from the Magistrate.

McElwaine, C.J. (S.S.)—The Respondent brought a suit in the Court of the First Class Magistrate at Ipoh claiming a declaration that he is the holder of a Bill of Sale over certain buffaloes and that these buffaloes are not liable to attachment by the appellant who had recovered judgment against one Budha, the grantor of the Bill of Sale. The respondent levied execution on his judgment and seized four buffaloes, two of which (according to the plaint) were included in the Bill of Sale and two of which were progeny born after the date of the Bill of Sale to animals included in the Bill of Sale. The respondent's evidence shews that only one was included in the Bill of Sale and that three were progeny.

The Magistrate dismissed the respondent's suit. He held that the Bill of Sale was no bar to the attachment and that the buffaloes being the property of Budha, their offspring were his also and therefore were liable to attachment. On appeal Murray Aynsley J. reversed this decision.

I think it doubtful whether a Bill of Sale by way of security absolutely bars seizure of the chattels under a writ of execution. See English O. LVI r. 12, Colony O. XLV r. 11. *Forster v. Clowser* (1897) 2 Q.B., 362. Whether section 312 of the Civil Procedure Code has the same effect in the F.M.S. it is not now necessary to inquire because the appellant only appeals against the portion of the judgment of Murray-Aynsley, J. which decided that the assurance of the animals in the Bill of Sale gave the present respondent the property in the offspring born after the date of the Bill of Sale. The present appellant also appeals against the Order for costs.

The material part of the Bill of Sale is as follows:—

> "In consideration of the sum of $475 now paid to Budha by Santa Singh, the said Budha doth hereby assign unto Santa Singh his executors, administrators, and assigns the things specified in the schedule hereto by way of security for the payment of the sum of $475 and interest."

Then follow covenants by Budha to pay, and to keep the property in good order and within the jurisdiction of the Court, and in default Santa Singh should be at liberty to foreclose. The Bill concludes with the statutory proviso that the chattels shall not be liable to seizure or to be taken possession of by Santa Singh for any cause other than by order of the Court.

Section 5 of the Bills of Sale Enactment provides that a bill of sale shall have effect only in respect of the personal chattels specifically described in the schedule and shall be void in respect of any personal chattels not so specifically described.

Murray-Aynsley J. decided that the Bill of Sale gave the property in the animals described in the schedule to the present respondent and that these animals being his property the offspring were his also.

The present Bill of Sale is a Bill by way of security: it is not an absolute Bill.

The case has been argued on the basis of the Bill of Sale being analogous to a legal mortgage conveying the legal Estate, subject to an equity of redemption.

Where there is an equity of redemption the ownership in the grantee is not absolute. I have indicated that in England and in the Colony the grantor's interest can be seized in execution, and also (in England at any rate) the goods comprised in a bill of sale by way of security are deemed to be in the order and disposition of a bankrupt grantor. *Swift v. Pannell* 24 Ch. D., 210.

Whether goods in such a bill of sale as the present are in the F.M.S. in the order and disposition of the bankrupt depends on the true construction of section 4 (iii) of the Bills of Sale Enactment:

> "Personal chattels comprised in a valid bill of sale which is duly attested and registered under this Enactment shall not, so long as such bill of sale continues to be duly registered under this Enactment, be deemed to be in the possession, order or disposition of the grantor of the bill of sale within the meaning of the law of bankruptcy."

The subsection is substantially section 20 of the English Act of 1878, a section which applies to absolute bills of sale but not to bills of sale by way of security. *Swift v. Pannell (supra).*

But in England there are two Acts while the F.M.S. Enactment is based upon a combination and consolidation of those acts. As it stands, section 4 (iii) appears to be absolute and it is not qualified by section 42 (c) of the Bankruptcy Enactment.

But a Bill of Sale by way of security is no protection against distress etc.—section 7. This is because the grantor still has a property in the subject matter of the Bill of Sale. These considerations indicate that there are even in the F.M.S. substantial differences in the protection accorded by absolute Bills of Sale and security bills of sale and in the rights conferred.

A security bill of sale transfers the ownership in the chattels.

> "A bill of sale is a document given with respect to the transfer of chattels, and is used in cases where possession is not intended to be given. Such a transaction is not a pledge, the conditions of which are entirely different. A bill of sale following the form in the schedule would, but for the proviso, give to the grantee an absolute right to the property in the goods assigned and also a right to the possession of them; but the proviso incorporates the provisions of section 7, which must be read into the deed, and which derogate from the full and absolute right of the grantee, not as to the property or the goods, but as to the circumstances under which they may be seized or taken possession cf. **Johnson v. Diprose** (1893) 1 Q.B. at 515.

Although section 7 of the English Act of 1882 is not reproduced in the Bills of Sale Enactment, the foregoing quotation shews that a Bill of Sale transfers the property but limits the right of possession. But when the bill is a security bill there is also a right to redeem, or to make the transfer void by payment of the debt.

It is therefore very similar to an ordinary mortgage where the mortgagor remains in possession. *Harrold v. Plenty* (1901) 2 Ch., 314.

Unless there is a covenant in the mortgage to the contrary, the mortgagor takes the crops grown on the mortgaged land.

If the mortgagor of land can take the produce of the land, why can the mortgagor of cattle not take the produce of the cattle? It has not been suggested that he could not take the milk of the buffaloes although they have been assigned—why can he not take this young?

The bill is given as a security that the lender will be repaid his loan of $475 with interest at 12% per annum. When the borrower repays the principal and agreed interest, he is entitled to a discharge of the Bill of Sale. He redeems his animals. This does not mean that he redeems the young born of the mortgaged animals because the young are not included in the bill of sale: they have not been mortgaged.

If the lender is entitled to retain the young as well as to have his principal repaid with interest, he gets more than he contracted for.

The provisions regarding security bills of sale are intended for the protection of the grantor; *Manchester Sheffield & Lincolnshire Rly. Co. v. North Central Wagon Company,* 13 A.C. at 560, and it appears to me that to give to the grantee of the bill more than he has contracted for is to construe a highly technical document too liberally in his favour.

In my opinion the after-born calves never were the property of the grantee Santa Singh. They were the property of Budha. If he sold them he would commit no criminal offence.

The three calves born after the date of the bill of sale were properly attached and I would allow this appeal with costs of the appeal only.

Gordon-Smith, Ag. J.A.—I have had the advantage of seeing the Judgment of Poyser, C.J. in this appeal.

I agree that, except as to costs, the point, and the only point before us, was to the effect as to whether the subsequent progeny of certain buffaloes which had been specifically described in a Bill of Sale, were included in such Bill of Sale and so passed to the Grantee. It is quite impossible under such circumstances to include a description of such progeny in the Bill of Sale and, having regard to the meticulous requirements of the Statutory form of a bill of sale, a departure from which renders the same void, it is therefore equally impossible to hold that such progeny (or after acquired property) is or can be included in a Bill of Sale and, at the same time, conform with those Statutory requirements.

For these and the reasons given by Poyser C.J., I would make the order proposed by him.

Appeal allowed in part.

[APPELLATE CIVIL JURISDICTION]

CUSSEN, J.

September 9, 1939.

CHAN CHOU HAR

v.

CHAN PHOOI HOONG (No. 1).

[SELANGOR CIVIL SUIT No. 100 of 1939]

Civil Procedure Code, Ss. 212, 213, 460 (i)—summary procedure—application for leave to defend—supporting affidavit by defendant—notice to cross-examine deponent—non-compliance with notice—rejection of affidavit—order giving conditional leave to defend—order set aside.

The defendant applied for leave to defend the Suit, and his application was supported by an affidavit. The plaintiff's solicitor gave notice to the defendant to attend for cross-examination on his affidavit. The defendant did not appear, but he was represented by Counsel at the hearing before the Registrar of his application for leave to defend. The Registrar held that the affidavit could not read but made an order giving leave to defend on payment into Court of the sum of $5,000/-.

On appeal to the Court of a Judge—

Held, that the Registrar was wrong in rejecting the affidavit and that the plaintiff should have asked the Registrar to make an order for attendance of the defendant and then, the Registrar should consider and decide whether to make an order or not.

Re Krishnasamy, (1933-34) F.M.S.L.R. 8; 2 M.L.J. 195 doubted.

APPEAL from the decision and order of the Registrar dated the 3rd August 1939, refusing to read an affidavit by the defendant in support of his application for leave to defend the Suit on the ground that the defendant failed to comply with a notice to produce the defendant for cross-examination on his affidavit.

Teh for defendant—appellant:—Order 14, r.3 (c) provides for cross-examination of a defendant in Summary Procedure in England. There is no such provision in our Code with regard to Summary Procedure. 0.38, r.28 enables a party by notice to require